INDEX

	Page
Statement of the case	1
Argument:	
I. The United States is not liable for the amount falling under Class 1, upon the vouchers involving which there was no protest of any kind	4
II. The United States is not liable for the amount falling under Class 2, upon the vouchers carrying the so-called short form of protest	7
III and IV. The so-called long form of protest was valueless	13

AUTHORITIES

Cases:	
Chicago, etc., R. Co. v. *Clark*, 178 U. S. 353	16
Chicago, etc., R. Co. v. *Clark*, 92 Fed. 968	5
Choteau v. *United States*, 95 U. S. 61	5
D'Arnaud's case, 95 U. S. 61	16
Murphy v. *United States*, 104 U. S. 464	5
Oregon-Washington R. & N. Co. v. *United States*, 255 U. S. 339	3, 5
Savage, Executrix, v. *United States*, 92 U. S. 382	16
United States v. *Adams*, 7 Wall. 463	5, 6
Encyclopedias:	
1 Cyc. 329	5

In the Supreme Court of the United States

OCTOBER TERM, 1924

SOUTHERN PACIFIC COMPANY, APPELLANT
v.
THE UNITED STATES
No. 285

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Upon requests by the United States the Southern Pacific Company transported between March 1, 1912, and June 18, 1916, certain classes of persons, not soldiers in service. At the time the requests for transportation were made and prior thereto and during the entire period here involved the Comptroller of the Treasury, to quote from appellant's brief on page 3, "had ruled that said several classes of persons were to be regarded as 'troops of the United States.'"

Following the transportation the appellant billed the United States therefor at the reduced rates agreed upon with the United States for the transportation of "troops of the United States."

The appellant had but did not employ the alternative of billing the United States at full commercial rates, for which purpose a special form was available.

It used the form prescribed for cases where transportation was on the so-called Land-Grant or reduced-fare basis, certifying therein to the total amount which it claimed, that the account so stated was correct and just, and, in effect, that it was asking to be compensated on the Land-Grant-Rate basis. On some of the bills or vouchers presented there was stamped or typewritten one or another of two forms of what appellant denominates and what for convenience will herein be designated as a "protest."

The bills or vouchers were presented to a disbursing officer, whose authority was strictly limited to payment on the Land-Grant basis, and were paid by him and the sums so paid accepted by appellant without any other protest than that described. The theory of the United States is that the appellant, having received full payment of the claims presented by it, can not, notwithstanding the so-called protest, now claim additional payment. Essentially the only question in the case is as to value or significance of the protest, although appellant contends for payment as to certain claims where no protest of any kind was used.

ARGUMENT

Introduction

The total amount claimed when this case was finally submitted to the Court of Claims was $186,-282.20. Of this total, appellant now concedes that on the authority of *Oregon-Washington Railroad and Navigation Co.* v. *United States*, 255 U. S. 339, it is not entitled to recover $39,253.54. See appellant's brief, page 4. This amount was involved in vouchers presented before January 1, 1914, prior to which time no protest of any kind was used. Deducting the amount stated, the claim is now for $147,028.66.

Of the amount now claimed, approximately one-half (exactly $71,329.14) (spoken of hereinafter as Class 1) is asked in connection with vouchers upon which there was no form of protest of any kind. Of the remaining approximately one-half (exactly $75,699.52), $24,176.62 was involved with vouchers containing the so-called short form of protest (spoken of hereinafter as Class 2) and $50,678.94 with vouchers containing the so-called long form of protest. Of the last-named amount all was for the carriage of others than discharged soldiers (spoken of hereinafter as Class 3) except only $7,865.95, which was for the carriage of discharged soldiers (spoken of hereinafter as Class 4). These several classes will be dealt with separately in this argument.

I

The United States is not liable for the amount falling under Class 1, upon the vouchers involving which there was no protest of any kind

As to Class 1, hereinbefore described and involving $71,329.14 of the total claim, the appellant is not entitled to recover for two reasons, each sufficient to forcelose its claim.

First. It agreed and by its course of conduct subsequently conceded that it did agree to carry the persons where transportation was involved in Class 1 at Land-Grant Rates, a conclusion sustained by the following reasoning:

The appellant agreed with the United States to transport "troops of the United States" at the Land-Grant Rates. Since the transportation of the persons here involved, it has been held, and it must now be conceded, that they were not "troops of the United States." Appellant was under no obligation, therefore, by reason of the said agreement, to carry them at reduced rates. Knowing, however, that the United States regarded these persons as falling under the general head of "troops" and as such entitled to Land-Grant Rates for transportation and receiving from the United States requests for their transportation, the appellant transported them with the understanding and without protest at the time of transportation or thereafter that it did not transport them with the same understanding as to the rates at which they were to be carried as the understand-

ing of the United States relative thereto. The appellant so conceded by billing the United States at Land-Grant Rates, in effect stating that its total claim for the transportation was calculated upon that basis and that the account so stated was correct and just. The effect of this concession as to the terms of the agreement with the United States is to destroy any claim now made upon any other basis. *Oregon-Washington Railroad and Navigation Co.* v. *United States*, 255 U. S. 339.

Second. If the appellant by its course of conduct did not concede that the agreement with the United States was that just urged, it will certainly now be conceded that such was the understanding of the United States as to the nature and extent of its obligation. At most, the appellant contended (although as to these particular claims never expressing that contention) that it was entitled to full commercial rates. The amount to which the appellant was entitled was that in dispute between appellant and the United States. If, in such a situation, the appellant chose (as it did here) to present as the amount it claimed and as all that it claimed, certifying the amount to be correct and just, a certain named amount, and if thereupon it was paid that amount and received it without protest, then under those circumstances we have a perfect case of accord and satisfaction. *Murphy* v. *United States*, 104 U. S. 464; *Choteau* v. *United States*, 95 U. S. 61; *United States* v. *Adams*, 7 Wall. 463; *Chicago, etc., R. Co.* v. *Clark*, 92 Fed. 968, 977; 1 Cyc. 329.

The case of *United States* v. *Adams*, 7 Wall. 463, is especially valuable in this connection. It applies also to Classes 2, 3, and 4 discussed hereinafter. In that case contractors with the Government submitted certain claims to a specially created commission, were awarded a less amount than that claimed, for which they receipted in full but under protest. Instead of presenting their claims to the commission referred to, they had the alternative of asking payment in full either from Congress or the Court of Claims. This court held that having voluntarily submitted their claims to this commission in order to obtain a speedier settlement of disputed claims, where the whole situation showed that it was the purpose of the Government that claims settled by this commission should be finally determined, and having received payment thereof even under protest, the claimant was foreclosed from any right to further payments on the theory that it had received only a partial payment.

That appellant impliedly concedes a doubt as to its right to recover as to these items appears from the statement in its brief on page 5 that: "In any event, appellant should be held entitled to recover as to the items specifically protested." Our view is that for the reasons hereinbefore indicated there is no doubt at all that as to the items in Class 1 appellant has no right of recovery whatever.

II

The United States is not liable for the amount falling under Class 2, upon the vouchers carrying the so-called short form of protest

All that we have said under subdivision I of this argument applies equally to the items involved under Class 2. The only difference in the facts is that here the words, "amounts claimed in this bill accepted under protest," were stamped on the vouchers when presented. If we are right in our view that the agreement was that the appellant should carry the persons transported at the Land-Grant Rates, such being the implied condition of the requests for transportation, and if they were thereupon carried by the appellant without anything from it indicating any other understanding, then no other assertion or protest thereafter made in whatever language could alter or increase the obligation of the United States. Presenting its claim upon the Land-Grant basis, which it was under no requirement of any kind to do (it had the alternative of presenting its claim on the commercial rate basis, for which a special form was provided), the appellant conceded that the agreement was that the United States should pay on that basis. It said, in effect, "This company claims so much in full payment for the transportation of persons on a Land-Grant basis," which was wholly inconsistent with any contention expressed or not expressed that the agreement was not on that basis.

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And the doctrine of accord and satisfaction is equally applicable to these items. At the most as to these items, the claim of the appellant was disputed by the United States as to all over the amount paid. Recognizing that fact, and with no necessity for so doing, the appellant asked for payment as of its claim in full on the Land-Grant basis and was so paid. Obviously, the United States intended by such payment full and final settlement. Under such circumstances, acceptance worked satisfaction. (Cases cited, *supra*.) The statement stamped by appellant on the vouchers that payments thereunder would be accepted under protest—a statement which, if it had any meaning, was clearly repugnant to the terms of the vouchers—was so indefinite as to be meaningless and as a protest without value. We can do no better than to quote here what the court below said as to the protest (page 13 of the record):

> We frequently encounter the apparent belief that a "protest" is "something to conjure with" under almost any circumstances; that it wipes out the disastrous results of any course of conduct; and that it creates as well as preserves rights. Equally is it sometimes the view that whatever its form or applicability it is only necessary to label it a "protest" and it is a protest. And these observations are not at all antagonistic to the idea that there may in fact be protests, rightly so called, and that they may at times be very efficacious in the accomplishment of their intended purpose, but suggest rather the necessity of

determining whether a so-called "protest" is in fact and in legal effect a protest, and whether, under the circumstances, it accomplishes anything as affecting the rights of the protestor. In one of our early cases, 13 Ct. Cls. 70, a protest was characterized as "so much waste paper," and in numerous cases they have been held ineffective for any purpose.

We find no established rule with reference to any particular form of protest in general, and this quite naturally so since the circumstances of each case must largely determine the applicable form, although in some cases in which protests are provided for by statute particularity is required, as, for example, in the matter of protests as to customs duties when the requirement is that it shall set forth "distinctly and specifically and in respect to each entry or payment the reasons for his objections thereto," while in other cases wherein the action taken is of such specific character that there is but one possible subject matter for protest the requirement only is that there shall be protest, which by necessary implication addresses itself to but the one matter, and that the action of a party other than the protestor.

To us it seems but reasonable to hold that if the transaction itself does not so define the situation that a protest in general terms can have but one application, and that an application entirely consistent with the relations of both parties to the transaction, then a protest must so specifically state its subject

matter and the respect in which action had is objected to that its purpose may clearly appear on its face.

We know now, in our consideration of this case, that plaintiff's contention is that the transportation in question was not subject to land-grant deduction, but the short form of protest used presented no question of land grant to the disbursing officer any more than it presented any one of the several other questions which might be involved in data stated in the voucher. So far as appears it might have been a question as to the number of men, the mileage traveled, the correct land-grant mileage, or the gross rate, as well as the applicability of land-grant rates.

We quote further from the opinion below (page 16 of the record):

In addition to suggestions made as to the indefinite character of this protest, we are asked to conclude that a public voucher made in the detailed form indicated and certified to be correct, not only as to its details but as to the "amount claimed," and which is required to be completely filled in before certification, without alteration or erasure all to the evident purpose that there shall be stated a clean-cut demand which may be paid by a disbursing officer at the "amount claimed" and that only, for which it becomes his acquittance, can be converted into a claim for a partial payment with reserved right to make further claim as to the same service by stamping thereon the statement that the "amount claimed" which

has been stated and certified by the claimant, is "accepted under protest."

We can not subscribe to such a theory. Its consistency, as well as its apparent purpose to take advantage of a method of settlement designed to accomplish finality while at the same time subverting that purpose, condemns it. And in that connection the necessities of Government accounting are properly for consideration and perhaps ought to be reverted to more than they are. With these necessities and the disadvantages of lack of finality in Government accounting those doing business with the Government not only are, for the most part, familiar, but should be chargeable with knowledge and, unless required for the protection of a legal right not otherwise to be asserted, practices which impose unnecessary burdens on the governmental system should not be encouraged by judicial sanction. And for consideration also is the fact that appropriations are for the service of fiscal years—that they are available for such time thereafter as Congress has thought reasonable to permit the adjustment of claims payable therefrom, a situation indicative of intention to accomplish reasonably prompt presentment and settlement of claims.

And if by such a procedure as that under consideration the finality of a settlement such as those here involved may be suspended and an account thus settled be held to be still open for further claims, predicated on the same service, to be asserted at any time within the six-year period of limitation,

> is there any reason why such a protest stamped upon any voucher in settlement of any claim of any character might not obviate its finality and serve to hold the whole matter open and subject to further claim at least until the intervention of the statute of limitation? If there is one thing apparent, predicated upon our observation in these matters, it is the great need for a revised system which shall require the prompt presentation of claims not only to the administrative and accounting offices but to this court as well, and while we can not assume legislative function, and we certainly can not but recognize and protect any right legal under the present system, we are not disposed by judicial construction to extend beyond legal requirements the effect of unnecessary and detrimental practices.
>
> We think it quite clear that the use during this period of this form of protest could avail the plaintiff nothing. Aside from the infirmity in the form of the protest, which sufficiently determines its value, what must be said in the discussion of the following period as to the efficacy of any protest will be applicable.

That the so-called short form of protest was so indefinite as to be valueless is certainly not overcome by the Finding of Fact No. VI (page 6 of Record) that a subordinate clerk in the office of the disbursing quartermaster understood what was intended by the protest. The knowledge of an employee having wholly ministerial duties and having no duty relating to protests of any kind is not imputible to his

superiors. It is elementary in the rule relating to imputible knowledge that the knowledge must relate to what was within the scope of the agent's authority and certainly receiving protests was no part of this clerk's duties nor within the scope of his authority.

III

The so-called long form of protest was valueless as to items falling in Class 3

The vouchers falling in this class were for claims for the transportation of others than discharged soldiers, but the protest used protested only the payment of reduced fares for discharged soldiers and constituted, therefore, no protest whatever as to Class 3 vouchers. It follows that Class 3 is in the same situation exactly as Class 1 discussed above under subdivision I of this argument.

IV

The long form of protest is valueless as to claims for the transportation of discharged soldiers

There remains to be considered the effect of the so-called long form of protest as to claims for the transportation of discharged soldiers (this form of protest having been used as to such claims in the amount of $7,865.96).

We submit that here also the appellant has no further claim against the United States.

Much that we have already said in this argument is obviously equally applicable to this class of Appellant's claims. Reference is made to such preceding argument and also to the very able discussion of this

phase of the case in the opinion of the court below, pages 18 to 26, inclusive, of the record, and to the discussion of the identical question by Chief Justice Campbell, of the Court of Claims, in the opinion in *Western Pacific Railroad Co.* v. *United States*, being Case No. 287 on the docket of this Court, which case the Court has ordered submitted with this case. The opinion in that case is at page 57 of the record in No. 287. No purpose would be served by mere repetition here of these arguments already before the Court and amply and clearly stated in these two opinions.

There is no escape from the conclusion that appellant voluntarily billed the United States upon the Land-Grant basis as for its claims in full. It was paid upon that basis and accepted payment. Under such circumstances its so-called protest, as the court below clearly points out in the two opinions mentioned, was wholly valueless for the reasons:

First, the protest was repugnant to the claim. The claim was certified as correct and just and therefore, in effect, as in full. The protest says, in effect, "this claim is not in full." The only payment which the disbursing officer had authority to make was that called for by the claim; that is, payment in full. Accepting payment from him the appellant necessarily accepted it upon that condition and by acceptance repudiated any protest which was wholly inconsistent with acceptance.

The situation may be illustrated thus: A contract has been entered into between *A* and *B*. *B* has

performed and seeks payment. A dispute exists as to the amount due. *A* has placed in the hands of his servant *X* the amount he claims is the full amount to which *B* is entitled. The limit of *X's* authority is to pay that amount to *B* in full settlement of the claim, all of which *B* knows. Having such knowledge *B* accepts from *X* the amount in his hands. Any protest he makes to *X* is meaningless. The acceptance with knowledge of the condition forecloses further claim.

Second. The protest was made to a ministerial officer of the Government, having no authority of any kind relative to protests, and made with knowledge that it could not and would not reach officers of the Government having discretion in the matter or any authority to consider the protest until long after the payment by the ministerial officer of the amount claimed and certified to him as correct and just.

Suppose there had been no protest stamped or typewritten on the bill or voucher. The bill or voucher is presented. The amount claimed is paid. Thereafter claimant protests. Under the doctrine of Accord and Satisfaction clearly he has no further rights. But what is the difference between that situation and one in which a protest is made to an agent who has no authority to receive or consider protests and is under no duty to communicate them to his superiors? Such a protest is the same as no protest or as a protest made to a stranger or as a protest made after acceptance of payment.

Numerous cases supporting the conclusions stated are cited in the opinions below. Reference is here made especially to *De Arnaud's case*, 151 U. S. 483; *Chicago, Milwaukee & St. Paul Railway Co.* v. *Clark*, 178 U. S. 353, and *Savage, Executrix*, v. *United States*, 92 U. S. 382.

CONCLUSION

It is respectfully submitted that appellant, having elected to settle with the United States on the Land Grant basis and having so elected voluntarily and without duress of any kind, is not entitled to any additional payment either as to those claims presented by it which bore no protest or as to those which bore a protest whether in the so-called short form or the so-called long form. The decision of the Court of Claims should be affirmed.

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Special Assistant to the Attorney General.

NOVEMBER, 1924.

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